

**HSBC Bank Malaysia Bhd v
CS Metal Industries (M) Sdn Bhd**

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HIGH COURT (KUALA LUMPUR) — PENGGULUNGAN SYARIKAT NO
D1–28–146 OF 2004

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VINCENT NG J

5 SEPTEMBER 2005

Companies and Corporations — Winding up — Petition under s 218 — Procedural defect — Whether the debt in the statutory notice has been acknowledged by the respondent as due and owing — Whether there are grounds to dispute the debt — Whether respondent in denying receipt of the notice was merely stalling for time

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Companies and Corporations — Winding up — Petition under s 218 — ‘Unless Order’ — Whether the respondent is estopped from denying debt having admitted before the court that the debt is due and owing

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The petitioner filed a petition against the respondent upon the respondent’s failure to comply with the statutory notice under s 218(1)(a) of the Companies Act 1965 (‘the Act’) claiming a sum due and owing to the petitioner in respect of banking facilities granted to the respondent. At the first hearing date, the respondent requested for an adjournment for a period of one month to settle the amount due on the said statutory notice. This was granted. However, at the second hearing date, the respondent informed the court that it intended to oppose the petition. At the third hearing date, the respondent informed the court that the respondent sought another deferment of about six weeks time to settle the petitioner’s claim, and should it fail to settle, the respondent would not oppose but concede to petitioner’s petition. Upon the petitioner’s consent which was given subject to the respondent’s concession pertaining to a winding up order, the court granted the application. It was then that an ‘unless order’ was made. When the petition was called for hearing on the fourth hearing date, the respondent again applied for postponement based on the same ground that the respondent intended to settle. As the petitioner and the supporting creditor made no objection to the request for adjournment, the court adjourned the hearing and the ‘unless order’ was then reaffirmed. On the fifth hearing date, the respondent yet again sought another adjournment on the same ground. The petitioner then objected to any further adjournment and the court proceeded with the hearing.

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Held:

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- (1) The court’s duty in a winding up petition is to ascertain and be satisfied, from whatever contemporaneous documents available, as to whether the debt in the statutory notice has been acknowledged by the respondent as due and owing

- A** or that there are no cogent grounds to dispute the debt. Even an unstamped document which indicates acknowledgement of debt could be examined when determining the issue, and in the instant case the unstamped document sought to be impugned was a mere letter of offer. Furthermore, the body of evidence preferred by the petitioner showed a series of correspondence between the petitioner and the respondent, which clearly indicated that the parties had negotiated a settlement of the claim which resulted in specific proposals and arrangement for payment offered by the respondent and accepted by the petitioner. This conduct clearly evinces acknowledgement of indebtedness on the part of the respondent, and the petitioner had correctly relied on them (see para 3).
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- C** (2) The respondent in denying receipt of the notice was merely stalling for time. Having established that the debt is due and owing to the petitioner as per s 218 of the Act, the respondent has not, in the circumstances, made any or any cogent attempt to show that it was able to pay its debts. Furthermore, its numerous abortive attempts at settlement of the debt would militate against any assertion of solvency (see para 4).
- D** (3) An 'unless order' in circumstances such as the present case is not only permissible but enforceable. It does not lie in the mouth of the respondent who has consented to an 'unless order' to now complain about the winding-up order being allowed. Having implicitly, through its plea for time to settle, admitted before the court that the debt is due and owing, the respondent is estopped from now denying so (see para 5).]
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[Bahasa Malaysia summary]

- F** Pempetisyen telah memfailkan petisyen terhadap responden ke atas kegagalan responden dalam mematuhi notis statutori di bawah s 218(1)(a) Akta Syarikat 1965 ('Akta tersebut') menuntut jumlah yang kena dibayar terhadap pempetisyen berkenaan kemudahan banking yang telah diberikan kepada responden. Pada tarikh perbicaraan pertama, responden telah meminta suatu penangguhan bagi tempoh satu bulan untuk menyelesaikan jumlah yang kena dibayar ke atas notis statutori tersebut.
- G** Ini telah diberikan. Tetapi, pada tarikh perbicaraan kedua, responden telah memberitahu mahkamah bahawa responden telah meminta penangguhan enam minggu untuk menyelesaikan tuntutan pempetisyen dan jikalau gagal menyelesaikannya, responden tidak akan membantah tetapi akan mengalah terhadap petisyen pempetisyen. Ke atas persetujuan pempetisyen yang diberikan subjek kepada konsesi responden berkenaan penggulungan perintah, mahkamah telah memberikan permohonan tersebut. Adalah pada masa tersebut satu 'unless order' telah dibuat. Apabila pempetisyen dipanggil untuk perbicaraan pada tarikh perbicaraan ke-empat, responden sekali lagi telah memohon untuk suatu penangguhan berdasarkan faktor kreditor tidak membuat sebarang bantahan terhadap permintaan untuk penagguhan, mahkamah telah menangguhkan perbicaraan dan 'unless order' telah diakui. Pada tarikh perbicaraan kelima, responden sekali lagi menuntut satu penangguhan ke atas
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alasan yang sama. Pempetisyen telah membantah terhadap penangguhan lanjut dan mahkamah telah meneruskan dengan perbicaraan tersebut.]

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Diputuskan:

- (1) Tugas mahkamah di dalam penggulungan petisyen adalah untuk mengenal pasti dan berpuas hati dengan apa-apa dokumen sezaman yang wujud sama ada hutang dalam notis statutori telah diakui oleh responden sebagai hutang yang kena dibayar atau tidak ada alasan-alasan yang meyakinkan untuk mempertikaikan hutang tersebut. Juga dokumen yang tidak distampkan yang menunjukkan pengakuan hutang boleh diperiksa apabila menentukan isu dan didalam kes ini dokumen yang tidak distampkan dan yang patut dipersoalkan adalah suatu surat tawaran. Lebih-lebih lagi, bukti yang disukai oleh pempetisyen menunjukkan siri surat-penyuratan di antara pempetisyen dan responden yang dengan jelasnya menunjukkan bahawa parti-parti boleh berunding satu kompromi tuntutan yang mengakibatkan cadangan khusus dan penyusunan bayaran yang telah ditawarkan oleh responden dan diterima oleh pempetisyen. Kelakuan ini jelasnya menunjukkan pengakuan hutang responden dan pempetisyen telah dengan jelasnya bergantung pada mereka (lihat perenggan 3).
- (2) Responden dalam menafikan resit notis adalah cuma melengah-lengahkan masa. Setelah memastikan hutang yang kena dibayar kepada pempetisyen dibawah s 218, responden belum di dalam keadaan membuat apa-apa percubaan yang meyakinkan untuk menunjukkan bahawa ia boleh membayar hutang. Selanjutnya, percubaan terbantut berkali-kali keatas kompromi hutang boleh menyekat terhadap sebarang kemampuan membayar (lihat perenggan 4).
- (3) Satu 'unless order' di dalam keadaan-keadaan seperti didalam kes ini bukan sahaja dibenarkan tetapi juga dikuatkuasakan. Tidak terletak pada responden yang telah bersetuju terhadap "unless order" untuk sekarang merungut tentang penggulungan perintah dibenarkan. Adalah tersirat melalui rayuan masa untuk mencapai satu pengakuan kompromi di hadapan mahkamah bahawa hutang kena dibayar, responden dihalang daripada menafikannya (lihat perenggan 5).

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Notes

For cases on winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1246.

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Cases referred to

Corporate Affairs Commission (NSW) V Austral Oil Estates Ltd (No 2) [1989] 10 ACLR 354 (refd)

Changhe International Investments Pte Ltd (formerly known as Druidston Pte Ltd) v Dexia Bil Asia Singapore Ltd (formely known as Banque International A Luxembourg Bil (Asia) Ltd [2005] SGCA 30 (refd)

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IOC Australia Pty Ltd v Mobil Oil Australia Ltd [1975] 49 ALJR 176 (refd)

KLT Sdn Bhd v Azrahi Hotel Sdn Bhd [2003] 5 MLJ 503 (refd)

Mittagong RSL Club Ltd and the Companies Act, Re [1980] 4 ACLR 897 (refd)

Roma Industries Pty Ltd, Re [1976] 1 ACLR 296 (refd)

- A *Securicor (M) Sdn Bhd v Universal Car Sdn Bhd* [1985] 1 MLJ 84 (refd)
Wei Giap Construction Co (Pte) Ltd v Intraco Ltd [1979] 2 MLJ 4 (refd)

Legislation referred to

- B Companies Act s 218(1)(a), (1)(e), (2)(a)
 Companies (Winding up) Rules 1972 r 32

Mohan Ramakrishnan (Skrine) for the petitioner.
Shaiful Omar Ahmad (Aziz Zakaria Shaifil & Wan) for the respondent.

- C **Vincent Ng J:**

- D [1] The petitioner filed a petition (encl 1) on 10 March 2004 against the
 respondent upon the respondent's failure to comply with the statutory notice under
 s 218(1)(a) of the Companies Act 1965 ('the Act') claiming a sum of
 RM3,167,398.99 with interests as at 12 December 2004, due and owing to the
 petitioner in respect of banking facilities granted to the respondent. Encl 1 was fixed
 for hearing on 24 June 2004 (the first hearing date) and the respondent filed a notice
 of intention to oppose the petition supported by an affidavit affirmed by Encik Kang
 Teng Hong, the finance director of the respondent company. Encl 1 was supported
 by several supporting creditors namely, Toyochem Graphics Sdn Bhd, Durachem Sdn
 Bhd, Seagull Logistics Sdn Bhd, Public Bank Berhad, Jit Hoe Hardware Sdn Bhd and
 Hong Leong Bank Berhad with the filing of their respective proper notices of
 intention to appear at the hearing to support the petition. As the papers were found
 to be in order, the registrar's certificate pursuant to r 32 of the Companies (Winding
 Up) Rules 1972 was issued. At the first hearing date of encl 1, the respondent's
 solicitors requested for an adjournment for a period of one month to settle the
 amount due on the said statutory notice. This was granted. The court adjourned the
 hearing to 26 August 2004 (the second hearing date). However, at the second hearing
 date, counsel for the respondent informed the court that it intended to oppose the
 petition. All parties then sought the court indulgence to file written submissions and
 the hearing was adjourned to 23 September 2004 (the third hearing date). At the
 third hearing date, the respondent's solicitor informed the court that the respondent
 sought another deferment of about six weeks time to settle the petitioner's claim, and
 should it fail to settle, the respondent would not oppose but concede to petitioner's
 petition. Upon the petitioner's consent which was given subject to the respondent's
 concession pertaining to a winding up order, the court granted the application and
 fixed 8 November 2004 as the next hearing date (the fourth hearing date). It was then
 that an 'unless order' was made. When the petition was called for hearing on the
 fourth hearing date, the respondent's counsel again applied for postponement based
 on the same ground that the respondent intended to settle. Again, on this occasion
 the respondent's counsel reiterated to the court that respondent would agree to a
 winding up order being made should its attempt at settlement be unsuccessful. As the
 petitioner and the supporting creditor's counsels made no objection to the request for
 adjournment, the court adjourned the hearing to 13 January 2005 (the fifth hearing
 date) and the 'unless order' made on 23 September 2004 was then reaffirmed. On the
 fifth hearing date, the respondent's counsel yet again sought another adjournment on
 the ground that they were still attempting a settlement while at the same time

admitting that until then the respondent had not made any payment even though six months had passed since the court was first informed of the respondent's intention to settle the petitioner's claim. As the petitioner was taken to the end of its petition, it finally objected to any further adjournment. Thus, as the parties had already filed their respective written submissions and did not want to further submit, the court proceeded with the hearing of encl 1.

THE LAW

[2] Encl 1 was grounded upon the respondent's inability to pay its debts pursuant to s 218(1)(e) of the Act read together with s 218(2)(a) of the same Act. Upon the court being satisfied that the amount demanded in the s 218 notice is clearly due and owing, the test of commercial insolvency is simple. It is this: whether the company is able to meet its current debts as they fall due? A company may have substantial wealth which cannot be realized immediately, and if that happens the company is said to be unable to pay its debts within the purview and ambit of s 218(1)(e) of the Act. This is so even though on liquidation the company will be able to meet all its liabilities. No doubt, a welter of cases have settled the proposition in law that a company should not be held to have 'neglected to pay' the debt if the debt is disputed on substantial grounds (see *Securicor (M) Sdn Bhd v Universal Car Sdn Bhd* [1985] 1 MLJ 84).

ON THE MERITS

[3] The respondent in its submission contended that the document evidencing the indebtedness that the petitioner is relying on was not stamped and as such could not have been brought before any court of law to enforce its claim. Encik Saiful, the learned counsel for the respondent clarified that the document referred to by him as being unstamped was the letter of offer in respect of the banking facility given to the respondent. It is my considered judgment that his submission on this point (document not being stamped) is untenable since the court's duty in a winding up petition is to ascertain and be satisfied from whatever contemporaneous documents available, as to whether the debt in the statutory notice has been acknowledged by the respondent as due and owing or that there are no cogent grounds to dispute the debt. In my view, even an unstamped document which indicates acknowledgement of debt could be examined when determining the issue and in the instant case the unstamped document sought to be impugned is a mere letter of offer. Furthermore, the body of evidence preferred by the petitioner as exhs showed series of correspondences between the petitioner, the respondent and their respective solicitors namely exhs GNC-5, GNC-6, GNC-7, GNC-8, GNC-9, GNC-10, GNC-11, GNC-12, GNC-13, GNC-14, GNC-15, and GNC-16 which indicated clearly that the parties had negotiated a settlement of the claim which resulted in specific proposals and arrangement for payment offered by the respondent and accepted by the petitioner. This conduct clearly evinces acknowledgement of indebtedness on the part of the respondent and the petitioner had correctly relied on them. Obviously, considering the course of normal human conduct, the respondent would not have been minded to negotiate a settlement unless indebtedness to the petitioner had been implicitly acknowledged. Indeed, in pursuance of the agreed terms of settlement, payments

A were in fact also tendered by the respondent. However, such payments by post-dated
cheques were stopped by a 'stop payment' directive from the respondent to its bank.
Also, to be noted is that the respondent had in its affidavit in opposition made only
bare denials on its indebtedness in the sum demanded by the petitioner without
condescending upon particulars to buttress such denial. This again shows its position
B to be untenable.

[4] The respondent had also contended that they did not receive the statutory
notice, though it did not deny that same had been sent to its registered office.
The statutory demand was served at the respondent's registered office and was
C received by the company secretary of the respondent. Clearly, as the respondent had,
subsequent to the receipt of the notice, negotiated for a settlement with the
petitioner, it could be reasonably inferred that they have received the statutory notice.
I am constrained to say that in denying receipt of the notice it was merely stalling for
time. Having established that the debt is due and owing to the petitioner as per the
s 218 notice, I find that the respondent has not, in the circumstances, made any or
D any cogent attempt to show that it was able to pay its debts. Furthermore, its
numerous abortive attempts at settlement of the debt would militate against any
assertion of solvency. It is trite law that where a petitioner has proved a debt and the
respondent fails to discharge the presumption of insolvency, as in the instant case, the
court is bound to give an order of winding up *Wei Giap Construction Co (Pte) Ltd v*
E *Intraco Ltd and* [1979] 2 MLJ 4 and *IOC Australia Pty Ltd v Mobil Oil Australia Ltd*
[1975] 49 ALJR 176 Thus, applying the authorities aforesaid and also in pursuance
of the 'unless order', the petition to wind up the respondent must be allowed, and so
it is ordered.

ON THE UNLESS ORDER

F [5] Counsel for the petitioner further submitted that the respondent had on two
occasions, namely, at the third and fourth hearing date, informed the court that they
would be conceding to encl 1 in the event that settlement of the petitioner's claim
should fail. And that, the court in allowing the respondent's request for adjournments
G had made the 'unless order.' This being so, my decision to allow encl 1 is further
grounded upon the 'unless order' made by me with the respondent's consent.
An 'unless order' in circumstances such as the present case is not only permissible but
enforceable, according to a long line of case authorities from England, Australia,
Singapore and here. See my decision in *KLT Sdn Bhd v Azrahi Hotel Sdn Bhd* [2003]
H 5 MLJ 503; *Changhe International Investments Pte Ltd (formerly known as Druidston*
Pte Ltd) v Dexia BIL Asia Singapore Ltd (formerly known as Banque Internationale A
Luxembourg BIL (Asia) Ltd [2005] SGCA 30 *Re Mittagong RSL Club Ltd and the*
Companies Act [1980] 4 ACLR 897; *Corporate Affairs Commission (NSW) v Austral*
Oil Estates (No 2) [1989] 10 ACLR 354 and *Re Roma Industries Pty Ltd* [1976] 1
I ACLR 296. It does not lie in the mouth of the respondent who has consented to an
'unless order' to now complain about the winding up order being allowed. Having
implicitly, through its plea for time to settle, admitted before this court that the debt

is due and owing, the respondent is estopped from now denying so, and I may add that it is unseemly and unbecoming for the same counsel to take this matter further.

Order allowed.

Reported by Peter Ling

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